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No. 126

In the Supreme Court of the United States

October Term, 1978

RAFAEL DOMINGO RAEL, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 130

EARLE ROBERT BALL, ET AL.

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims dismissing the petition (Pet. App. 1a-9a) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered January 31, 1956 (Pet. App. 1a). The petition for a writ of certiorari, pursuant to orders of the Chief Justice extending time for filing, was filed June 1, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether petitioners' claims for loss of salary incurred by reason of alleged illegal demotions, which admittedly took place more than six years prior to the

date of the filing of their suits, are barred by the six year statute of limitations applicable to suits in the Court of Claims.

STATUTES INVOLVED

The pertinent provisions of the applicable statutes are set forth in the Appendix, *infra*, pp. 7-8.

STATEMENT

Petitioners, honorably discharged veterans of the armed forces of the United States, are employed by the Department of the Navy in the Philadelphia Naval Shipyard (Pet. App. 1a). On January 5, 1948, all plaintiffs, except Eugene C. Callahan, were reduced in rank, grade, and salary from their leadingman positions to various journeyman positions (Pet. App. 1a). On November 1, 1948, all plaintiffs, except Callahan, were restored to their former ranks, grades, and salaries pursuant to a temporary mandatory injunction issued by the United States District Court for the Eastern District of Pennsylvania, which held that petitioners had been "unlawfully reduced" in grade (Pet. App. 1a-2a). Plaintiff Callahan was reduced in grade on September 8, 1947, and was restored by order of the same District Court on July 14, 1948, for the same reason (Pet. App. 2a). On appeal the temporary injunctions were vacated and the causes remanded to the District Court for further proceedings, *Hopkins* v. *Wallin*, 179 F. 2d 136 (C.A.3), and in 1954 the causes were finally dismissed in the District Court for lack of prosecution (Pet. App. 4a).

On April 8, 1955, petitioners filed suit in the Court of Claims to recover pay allegedly due them from the United States as a result of their alleged illegal reduction in grade (Pet. App. 2a). The Court of Claims on January 31, 1956, granted the Government's motion to

dismiss the petition as not timely filed (Pet. App. 1a-9a). Pointing out that 28 U.S.C. 2501 fixed a six-year limitation on suit once a claim has accrued, the court found that, in accordance with recognized principles applicable to statutes of limitations, petitioners' causes of action had accrued on the dates of their alleged illegal demotions, and that their suit, filed more than six years after those dates, was barred by the statute (Pet. App. 2a-6a). The court held further that the statute of limitations applicable to suits in the Court of Claims was not tolled by the operation of 28 U.S.C. 1500, assuming *arguendo* that this section prevented petitioners from maintaining suit in the Court of Claims while their District Court action was pending (Pet. App. 6a-9a).

ARGUMENT

The only question before the Court of Claims was whether petitioners filed their suit within the time provided by statute. The Court of Claims, in a carefully documented opinion, found that they did not. We submit that this holding is clearly correct, and that it is in full accord with decisions of both this Court and the Court of Claims. Accordingly, review by this Court in unwarranted.

The statute of limitations applicable to suits in the Court of Claims provides (28 U.S.C. 2501) that all such claims "shall be barred unless the petition thereon is filed * * * within six years after such claim first accrues." Petitioners were reduced in grade on January 5, 1948 (except for petitioner Callahan, who was reduced in grade on September 8, 1947), more than six years prior to April 8, 1955, the date of the institution of their suit; and the Court of Claims, holding that their causes of action, if any, had accrued on the dates of

their allegedly unlawful reduction in grade, therefore properly dismissed the complaint as untimely.

a. It is well established that petitioners' causes of action under the Veterans' Preference Act, 5 U.S.C. 863, *infra*, p. 7, "accrued on the dates when the alleged wrongful reductions became effective. If wrongful, the liability of the defendant became fixed on those dates and the plaintiffs were then entitled to institute suits." *Group* v. *United States*, 125 C. Cls. 135, 137. It is from those dates that they would be entitled to recover lost pay (*Stringer* v. *United States*, 117 C. Cls. 30) and, in the absence of "subsequent actions * * * taken by defendant which would give rise to a new cause of action" (*Group* v. *United States*, *supra*), it is from those dates that the limitation times begin to run. Here no such subsequent actions are alleged and accordingly it is plain that petitioners failed to institute timely suit.

b. There is no merit in petitioners' contention that their causes of action under the Veterans' Preference Act did not accrue until the reinstatement proceedings in the District Court were finally terminated for lack of prosecution in 1954. Although, by statute, a mandatory recommendation of reinstatement by the Civil Service Commission has the effect of creating a new cause of action for back pay (*Goodwin* v. *United States*, 127 C. Cls. 417; cf. *Upton* v. *United States*, C. Cls. No. 568-52, decided June 7, 1955), there is no statutory basis for according such effect to litigation in the courts, especially when it is unsuccessful.[1] As the decision

[1] Even if, as petitioners appear to contend (Pet. 5-6), the short-lived temporary injunctions of July 14 and November 1, 1948, gave rise to a cause of action, they are of no consequence here as they were granted more than six years prior to the institution of this suit.

below points out (Pet. App. 5a-6a), the Court of Claims has held, in cases involving alleged violations of veterans' rights under the Veterans' Preference Act, that a cause of action is not prevented from accruing either by the failure to pursue administrative remedies provided by the statute (*Griffo* v. *United States*, 131 C. Cls. 60) or by the pendency of such proceedings (*Gray* v. *United States*, 124 C. Cls. 333; *McCormick* v. *United States*, 124 C. Cls. 111; *Thomas* v. *United States*, 125 C. Cls. 76). Likewise, the mere pendency of the District Court suit obviously did not prevent the accrual of petitioners' causes of action as of the dates of their demotions.

c. Petitioners argue, however, that even if their causes of action did accrue at that time, the statute of limitations was tolled by operation of 28 U.S.C. 1500. Assuming without deciding (Pet. App. 6a) that this section of the Judicial Code (set forth *infra*, p. 8) would have prevented petitioners from maintaining their suit for back pay while the District Court action was pending, the Court of Claims held that nevertheless the statute of limitations was not thereby tolled (Pet. App. 6a).

It is well established that the mere fact that petitioners had claims pending in another tribunal is no ground for tolling the statute of limitations. *Vlagan* v. *United States*, 101 C. Cls. 294, certiorari denied, 323 U.S. 673; *Lowry* v. *United States*, 125 C. Cls. 598. The statute creating the six year limitation on suit in the Court of Claims (28 U.S.C. 2501, *infra*, p. 8) provides for the tolling of the limitation period in only two specified instances: where the claimant is "under legal disability or beyond the seas at the time the claim accrues * * *." This phrase is simply an adoption of the traditional exemptions for such classes as "married

women, minors, idiots, lunatics, insane persons, and persons beyond the seas * * *" (*Marcos* v. *United States*, 122 C. Cls. 641, 649), as spelled out in the prior limitations statute, former section 262 of Title 28; it plainly does not include petitioners.[2]

Nor can petitioners contend that the operation of 28 U.S.C. 1500 (*infra*, p. 8) prevented the timely prosecution of their salary claims. At any time during the six-year period petitioners could have dismissed their District Court proceeding and brought their suit in the Court of Claims.[3]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE, 1956.

[2] Moreover, since this clause expressly provides that the disability must exist at the time the claim accrues, it plainly cannot apply to petitioners, whose causes of action accrued prior to the commencement of their District Court suits (*supra*, p. 4).

[3] It should be noted that here there is and can be no allegation that the courts were closed to petitioners by war. Cf. *Hanger* v. *Abbott*, 6 Wall. 532, 539.

APPENDIX

5 U.S.C. 863 provides in pertinent part:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision * * *.

5 U.S.C. 652(b)(3) provides:

> Any person removed or suspended without pay in a reduction in force who, after an appeal to proper authority, is reinstated or restored to duty on the ground that such removal or suspension was unjustified or unwarranted shall be paid compen-

sation at the rate received on the date of such removal or suspension, for the period for which he received no compensation with respect to the position from which he was removed or suspended, less any amounts earned by him through other employment during such period, and shall for all purposes except the accumulation of leave be deemed to have rendered service during such period. A decision with respect to any appeal to proper authority under this paragraph shall be made at the earliest practicable date.

28 U.S.C. 1500 provides:

The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

28 U.S.C. 2501 provides in pertinent part:

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues.

* * * * *

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

* * * * *

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